Ready Mixed Concrete Company *and* International Brotherhood of Teamsters, AFL–CIO, Local No. 13. Case 27–CA–13393

July 17, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On April 21, 1995, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings[2], and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Ready Mixed Concrete Company, Denver, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has requested oral argument. The request is denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[2] The judge at sec. III, ''The Respondent's Defense,'' par. 17 of her decision inadvertently stated that ''. . . assuming that I had credited Harrison's testimony on cross examination that he asked Harrison . . . .'' The second reference to ''Harrison'' should have been to discriminatee Teter.

Donald E. Chavez, Esq., for the General Counsel.
S. Lorrie Ray, Esq. and *Kermit L. Darkey, Esq.*, of Denver, Colorado, for the Respondent.
Frank L. Frauenfeld, of Denver, Colorado, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. This case was tried in Denver, Colorado, on February 21 and 22, 1995. The charge and amended charge were filed September 15 and 22, 1994,[2] respectively and the complaint issued on October 27, 1994. An amendment to the complaint issued on February 6, 1995. At issue is whether employee Terry Teter was suspended and discharged in violation of Section 8(a)(1) and (3) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Ready Mixed Concrete Company (the Respondent), a corporation, produces and delivers ready mixed concrete at its facilities in Denver, Colorado, where it annually sells and ships goods and services valued in excess of $50,000 to customers outside the State of Colorado and purchases goods and materials valued in excess of $50,000 directly from sources outside the State. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that International Brotherhood of Teamsters, AFL–CIO, Local No. 13 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Respondent manufactures and supplies ready mixed concrete to the building and construction industry in the greater Denver, Colorado metropolitan area. In August and September, it employed about 50 drivers who operated ready mixed concrete trucks and bulk cement trucks. Operations manager for the ready mixed concrete division of the Respondent is Joe Moseley. Reporting to Moseley is Driver Supervisor Eugene Harrison. Curtis Jones was the dispatch supervisor at all relevant times. President and chief operating officer of the Respondent is Frank P. Spratlan IV. The Respondent admits that these individuals are supervisors within the meaning of Section 2(11) of the Act.

Within the Denver metropolitan area, the Respondent manufactures concrete at three locations: Castle Rock and Brighton (in outlying areas) and the main plant at the corporate offices at Interstates 25 and 70. The drivers work on one shift and report to any of the three concrete manufacturing plants as required by the flow of business. The supervisors are located at the main plant. When drivers are on the road, they have the ability to maintain radio contact with dispatch subject to the hilly terrain.

Alleged discriminatee Teter began work at the Respondent in March 1991 as a driver. He worked in dispatch for about 9 months and then returned to driving in 1992. He was discharged on September 15. The Respondent admits its suspension, discharge, and refusal to reinstate Teter. The Respondent denies that Teter's discharge was due to his union or protected, concerted activity. The Respondent asserts that Teter was discharged for failure to wear a hardhat while outside his truck, for damaging a manhole cover[3] on August 31, and for failing to report the manhole incident to the Respondent.

[1] The name of the Respondent was amended at the hearing to reflect the correct legal name. Prior to the amendment, the name had been referred to both as Ready ''Mix'' and Ready ''Mixed'' Concrete Company.

[2] Unless otherwise specified, all dates are in 1994.

[3] The manhole ''cover'' is a cast iron ring which looks like a collar and rests on concrete. A manhole ''lid'' usually rests on the cover. The lid is the portion of the manhole most commonly seen. The manhole cover at issue here did not have a lid on it.

The Respondent asserts, in addition, that even if Teter's protected, concerted or union activity were a motivating factor in its decision to discharge Teter, the Respondent would have discharged Teter in any event due to his failure to report the accident in combination with the damage to the manhole cover and repeated failure to wear a hardhat. The General Counsel does not contest Teter's failure to wear a hardhat, damage to the manhole cover, and failure of Teter himself to report the incident.

B. *Safety and Accident Rules*

It is undisputed that the Respondent maintains a rule in its drivers' handbook (as updated June 17) requiring its drivers to wear hardhats *when ever you are outside the truck*.'' (Emphasis in original.) This rule applies at the plant, in the yard, and on all jobsites. It is also undisputed that this rule was not strictly enforced until mid-June.[4] In addition, the Drivers Handbook advises that if a driver is involved in an accident, ''DO NOT admit responsibility. You need to notify the Dispatcher immediately as to the nature of the accident and any injuries involved. You must also remain at the scene until your supervisor arrives.''

All drivers are given copies of the handbook. Teter was aware of the rules and admitted that he did not always comply with the hardhat rule. In April, Respondent's records indicate Teter was verbally warned for failure to wear his hardhat twice during a 1-week period. Due to illness, Teter was off work from mid-May until the middle of July. When he returned to work, he was assigned duties in the dispatch department. In mid-August he began driving again. Safety meetings were conducted by the Respondent somewhat irregularly but approaching a bi-monthly basis. The requirement that drivers wear their hardhats when not in the truck was discussed during these meetings. Teter attended a meeting on September 13 at which this topic was discussed.

C. *The Accident*

Teter damaged a manhole cover on August 31 while delivering concrete to Lawson Construction. According to Teter, Mark Garcia, the general foreman of Lawson, utilized a mobile phone, called the Respondent, and reported the accident immediately. Teter testified that he did not report the accident himself because he was present when Garcia called. Teter further testified that he recounted the accident to Harrison on either August 31 or September 1 and that Harrison made no comment about possible discipline, either for the accident or for failure to report the accident. In addition, several days after the accident, Teter spoke with Moseley about it and Moseley said if Lawson was not upset about the damage, he was not going to worry about it either. I credit Teter's account of these events.[5] Moseley was conspicuously absent from these proceedings.

Employee Marvin Jones testified he was present at the Lawson Construction worksite on August 31. He saw Teter damage the manhole cover. Jones testified that Teter laughed about the incident. Later, Garcia and Jones spoke and, according to Jones, Garcia said, ''Well, I ain't going to say nothing if he don't say nothing. I am just going to leave it alone.'' On the following day, however, Jones saw Harrison at the jobsite inspecting the damage to the manhole cover and shaking his head. Although Harrison asked Jones what happened, Jones responded that he did not know. Jones testified that he told Harrison this because, ''drivers wasn't really telling on drivers.'' Harrison confirmed that Jones did not tell him that Teter was laughing after the accident occurred. I do not credit Marvin Jones' testimony.[6]

Harrison testified that he was informed of the accident 1 day after it happened (September 1) by Respondent's quality control personnel. Quality control is a separate division of the Respondent. The quality control personnel were not named and were not called to testify. Harrison went to the site to investigate the damage. By coincidence, Teter was there. Harrison asked Teter what happened. Teter responded, Well, I hit the manhole cover.'' Harrison asked for an explanation and Teter responded, ''Shit happens.''[7] Both Harrison's initial rendition and Teter's version of this conversation are in agreement that there was no mention of failure to report the accident. However, on cross-examination, Harrison recalled that he asked Teter why he had not reported the accident and that Teter responded that he had told Garcia and Garcia had told him not to worry about it. Harrison also spoke to Garcia. According to Harrison, Garcia stated that he had not called anyone at the Respondent except quality con-

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[4] On June 22, the Respondent was certified as having met all the requirements for the State of Colorado Premium Cost Containment program thus allowing it to reduce its workers' compensation insurance premiums. In order to receive the certification, the Respondent implemented all required safety procedures in June 1993 or before. According to Human Resources Manager Hale, no policy change in enforcement of the rules took place due to receipt of the certification. However, both Curtis Jones and Harrison agreed that the rules regarding use of safety equipment were more vigorously enforced beginning in June.

[5] Teter readily admitted the hardhat violations, the accident, and his reliance on Garcia to report the accident. He did not embellish, argue, or attempt to fabricate. Rather, he was direct and straightforward with a forthright demeanor.

[6] The Respondent argues that Teter should be discredited generally because he testified that he spoke to about one-half of the drivers regarding unionization and they said they would be willing to consider the Union while Marvin Jones stated that he contacted about one-half of the drivers and they were all against the Union. The Respondent overlooks the fact that Marvin Jones' testimony was inconsistent. He testified in the district court 10(j) proceeding that he talked to all of drivers and they all were against unionization. In any event, due to his own inconsistency, his inconsistency with Harrison regarding what was said at safety meetings, and his obvious attempts to testify in support of the Respondent's position, Marvin Jones was not a credible witness and reliance on his testimony to discredit Teter is without merit. Moreover, even if Jones did speak with one-half of the employees who were against unionization, it is possible that Teter simply spoke to the other half.

[7] Teter testified on cross-examination that he could have responded in this way. He began to say something further but was interrupted with another question. When he was asked the same question a day later in rebuttal, he responded that he did not respond by saying, ''Shit happens.'' I find that Teter was generally truthful. However, this inconsistency indicates that his recall on some subjects was uncertain. I credit Teter's original response, that he could have responded by saying, ''Shit happens.'' However, I note that Teter admitted failure to wear his hardhat. He admitted the damage to the manhole cover. Based on his ready admissions, the logical consistency of his testimony, and his general demeanor, I find that he was a truthful witness.

trol to get someone to come over.[8] I do not credit Harrison's testimony regarding how he was informed of the accident. Although I believe that Harrison was generally truthful, I find that failure to call the quality control personnel supports an adverse inference that their testimony would not concur with Harrison's. Accordingly, where is conflict between Teter and Harrison on this issue, I credit Teter over Harrison.[9]

By letter of September 14, Harrison informed Teter that the Safety Review Committee[10] would look into the accident and, depending on the results of their findings, further disciplinary action could be taken resulting in suspension or termination. Although the letter also stated that the Respondent was informed about the accident on August 31, Harrison testified that this statement was incorrect. Harrison hand wrote the letter and then it was typed by a clerical for Harrison's signature. Harrison stated that he did not transpose anything—he just put down August 31 when he meant an accident of August 31 reported on September 1. I do not credit this after-the-fact attempt to differ with the language of the letter.

D. *The Suspension*

On September 14, Harrison took the letter to the jobsite to deliver it to Teter because he wanted Teter to have the letter before the Safety Review Committee met that afternoon. This was not Harrison's' normal practice. Usually he gave these letters to employees at the plant. However, he stated he made this trip as a courtesy because he had a meeting away from the plant that day and wanted to make sure that Teter was informed of the meeting. When Harrison approached the jobsite, he saw that Teter was out of his truck and not wearing his hardhat. He asked Teter about the absence of his hardhat and Teter responded that he had just jumped out of his truck so that he could hear what the foreman was saying. However, Harrison testified that he saw Teter at a distance of a quarter mile from the site and that Teter was standing there without his hardhat for a long time. Harrison had previously talked with Teter about failure to wear his hardhat. When Harrison gave the letter about the Safety Review Committee meeting to Teter, he decided he would also suspend Teter because Teter was not safe to be on a jobsite.

That same day, Harrison composed a suspension notice which he gave to Teter that afternoon. The notice suspended Teter immediately due to failure to wear his hardhat and further states that if the accident proved to be chargeable pursuant to the Safety Review examination, Teter would be discharged without further consideration for reemployment. The letter did not mention failure to report the August 31 accident.

E. *The Discharge*

Following the decision of the Safety Review Committee finding Teter chargeable for the August 31 accident, Harrison testified that he thought Teter should be terminated. He conferred with Moseley and it became a joint decision because Harrison really wanted Moseley's involvement in the decision. Harrison explained the decision to discharge Teter involved four factors: Teter's poor attitude toward the Respondent and its customers;[11] Teter's failure to take safety requirements, such as the hardhat rule, seriously; Teter's accident; and Teter's failure to report the accident.[12] There have not been any other failures to report accidents as far as Harrison knew except for an incident involving driver Louie Leyba which Harrison investigated. Due to the investigation Harrison was convinced that Leyba did not know he had made contact with another vehicle.

III. ANALYSIS AND CONCLUSIONS

A. *Statutory Framework*

Section 8(a)(1) and (3) of the Act provides:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> . . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

In *Wright Line*,[13] the Board outlined the burden and allocation of proof in cases which turn on the employer's moti-

[8] Although Garcia was not called by either the Respondent or the General Counsel, I draw no adverse inference based upon his failure to testify as Garcia, a foreman for Lawson Construction, is not particularly within the control of either party.

[9] The Respondent asserts that Teter's hardhat transgressions were a source of irritation to other employees based on Harrison's statement that three employees had asked about Teter's failure to wear a hardhat. I do not credit this portion of Harrison's testimony. It is improbable that if Harrison were asked such questions, he would not have talked with Teter about the problem and Harrison openly admitted that he never mentioned it to Teter.

[10] Harrison formed the Safety Review Committee after he took over as delivery supervisor in November 1993. The committee is made up of Harrison and two drivers. The committee reviews accidents to determine if the driver was at fault in causing the accident. If the committee unanimously so concludes, the accident is considered ''chargeable.'' The driver-members of the committee do not know the identity of the driver involved in the accident. The committee meets at irregular times but approximately once per month and the driver-members may be different at various meetings. The committee reviews all accidents that have occurred since the prior accident. The committee meeting immediately prior to the one held on September 14 involved four or five accidents while the September 14 meeting considered three accidents. In August, Harrison began notifying drivers that their accidents would be the subject of review at a particular Safety Review Committee meeting.

[11] Apparently, Teter's attitude problem had existed for some time. According to Harrison's testimony, Moseley and Harrison spoke about this when Teter was reassigned from dispatch to driving in August. Harrison objected to having Teter put back on driving due to his attitude problem and Moseley said that was why Moseley wanted him out of dispatch.

[12] Respondent's records reflect that Teter received a verbal contact in April for failure to fill out ticket times. He was also involved in an incident on August 10 when he allegedly made a derogatory comment about a receptionist. Moseley ''talked to'' Teter about this incident. Neither of these incidents played a part in the decision to discharge according to Harrison.

[13] *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982); ap-

vation in taking personnel action against an employee. First, the General Counsel must prove the existence of protected activity, knowledge of that activity by the employer, and animus. The employer may then rebut this prima facie case by proof that the prohibited motivations played no part in its action,[14] or by demonstrating by a preponderance of the evidence that it would have taken the same action for legitimate reasons regardless of the protected activity.[15] While the General Counsel argues that this case does not involve a *Wright Line* analysis because the employer's alleged justification is no more than a sham or a pretext, the Respondent argues that the *Wright Line* mixed motive analysis is appropriate.

B. *The General Counsel's Prima Facie Case*[16]

Protected, concerted activity: During the last week of August (roughly the same time as the accident) and the first 2 weeks of September, Teter spoke with about one-half of the employees about obtaining union representation, called the Union about representing employees, and visited the Union on three occasions (September 12, 13, and 15). He signed a union authorization card and enlisted the Union to consider representing the drivers. He spoke to five or six employees about attending the September 13 meeting with the Union and spoke with three or four about the meeting to be held on September 15. Employee Bart Morrison, whom I found to be a highly credible witness due to his thoughtfulness and serious demeanor, confirmed that Teter spoke to him about the Union and he knew from ''a couple'' of other drivers that Teter had spoken with them as well. Accordingly, the General Counsel has shown that Teter engaged in protected, concerted activity and union activity.

Animus: The General Counsel relies on one conversation which occurred in June to establish animus. Prior to engaging in union activity, Teter had a conversation with Moseley. Teter told Moseley that, ''somebody was liable to go to the Union and try to get them to come back in.''[17] Teter testified: ''And Joe [Moseley] got really tense, and he said as long as he was there—here we go—verbatim, he said as long as he was there, those scum-sucking, lazy, sorry-ass son of a bitches wouldn't get back in.'' After Teter questioned Moseley regarding whether he was ''middle class,'' Teter stated that unions created the middle class of America. Moseley responded that he did not want to hear ''any more of your shit.'' Teter said, ''Let me leave you with a parting thought: I have in my wallet an outcard from the Teamsters' Union, and I am still a member.'' The Respondent did not call Moseley to testify. Accordingly, I infer that his testimony would have been in accord with that of Teter. Based on this conversation, I find that the Respondent harbored animus toward the union.

Knowledge: Although Teter readily acknowledged that he kept his conversations with employees private, I find there is ample independent evidence of knowledge of Teter's activities. Employee Robert Nash testified that he spoke with Moseley after Teter approached him twice about supporting the Union. The conversation took place ''maybe a couple of weeks before [Teter was terminated].'' Nash told Moseley he was getting tired of Teter ''coming up to me about the union all the time.'' Nash told Moseley that he did not want any part in it and that some of the guys were concerned about the Union coming in—''We didn't want them to come in, really. That was—that Terry was persistent on the issue.'' He also told Moseley that Teter was going to meet with the Union. Moseley responded that he could not help Nash because Teter had a right to ''do that.'' I credit Nash based on his testimony in the district court 10(j) proceeding. Moreover, based on Moseley's failure to testify, I infer that his testimony would have been the same. Spratlan testified that Moseley never told him about the conversation with Nash. Finally, after Teter was suspended on September 14, he approached President Spratlan and told him (according to Spratlan) that he was going to go to the labor union or (according to Teter) that he had contacted the Union and was going to attempt to form a bargaining unit. Teter testified that he told Moseley the same thing while he was waiting to see Spratlan. Based on the failure to call Moseley, I infer Teter's version of the conversation with Moseley was accurate.

Dispatch Supervisor Curtis Jones was aware of Teter's activity. Teter called Curtis Jones toward the end of August and told him he was thinking about canvassing the drivers to see if there was enough interest in approaching the Union. A week later, Teter told Curtis Jones that half of the drivers were willing to consider the Union. On Friday, September 9, Curtis Jones asked Moseley if Moseley knew anything about a union. Moseley responded no. Curtis Jones impressed me as a reliable, credible witness. Although he no longer worked for the Respondent, he left voluntarily and did not exhibit any bias or bad feelings toward the Respondent. Moreover, because Moseley did not testify, I infer that his testimony would have been consistent with Nash's and Curtis Jones'. I find that Moseley had knowledge of Teter's union and protected, concerted activity. I further impute Moseley's knowl-

proved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

[14] See, e.g., *NKC of America*, 291 NLRB 683 fn. 4 (1988) (a respondent can defend an 8(a)(3) charge by showing that the alleged discriminatee's protected activity played no part in its personnel action).

[15] See, e.g., *Hyatt Regency Memphis*, 296 NLRB 259, 260 (1989), enfd. 939 F.2d 361 (6th Cir. 1991) (quoting *Roure Bertrand Dupont, Inc*., 271 NLRB 443 (1981): in rebutting the General Counsel's prima facie case, the employer ''must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.'')

[16] Moseley, a key witness for the Respondent, was not called to testify by the Respondent. Moseley figured prominently in the General Counsel's prima facie case regarding both animus and knowledge. Moreover, Moseley was equally important to the Respondent's defense. His absence from the witness stand allows an adverse inference, which I draw, that his testimony would not have corroborated the testimony of the Respondent's witnesses and would not have supported the Respondent's defense to the General Counsel's prima facie case. *Basin Frozen Foods*, 307 NLRB 1406, 1417 (1992), citing *International Automated Machines*, 285 NLRB 1122, 1123 (1987). (''[W]hen a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge.'')

[17] The Union represented the drivers until they were decertified in 1988. Harrison worked as a driver until a strike in 1988, at which time he quit and refused to cross the picket line.

edge to the Respondent.[18] I do not impute Curtis Jones' knowledge to the Respondent because he testified that he did not speak with any member of supervision about Teter's activities and that he did not take part in the decision to discharge Teter. Harrison and Spratlan denied knowledge of any of Teter's activities and also denied knowledge of any conversation that Moseley had with Jones or Nash. Based on Moseley's failure to testify, I infer that these members of management had knowledge of Teter's activities. Moreover, I note some confusion in Harrison's testimony on this point as follows:

> Q. You didn't know until today that Robert Nash told Joe Moseley the drivers were engaged in union activity and Terry Teter was pushing the union and Terry Teter was going to the union?
>
> A. I have to be honest with you. I am not sure I knew of that. I mean, I may have heard something about it. But no, we never sat down and discussed it.
>
> Q. You don't—not until today you have heard this?
>
> A. Some possible discussion of it. It mean, I don't recall the things that were being said here. No.

Based on the above evidence of protected, concerted, and union activity, animus, and knowledge, I find that the General Counsel has made a prima facie showing ''sufficient to support the inference that protected conduct was a 'motivating factor' in the [Respondent's] decision''[19] to suspend and discharge Teter. At the close of the General Counsel's case in chief, the Respondent moved for a directed verdict based on failure of the General Counsel to make out a prima facie case. I deferred ruling on the motion until the time of my decision. The Respondent's motion is denied. Further, I decline the General Counsel's invitation to analyze this case based on pretext. Rather, based on the facts set forth here, I find that this case must be analyzed as a mixed motive case.

C. *The Respondent's Defense*

Examination of the reasons for discharge of Teter reveals that he would not have been discharged had he not engaged in union and protected, concerted activity. The Respondent admits that Teter's hardhat violation and the accident, either alone or in conjunction, would not have resulted in discharge. The General Counsel's evidence of other incidence of hardhat violations and chargeable accidents, alone and in combination, also reveals that other employees were not discharged under such circumstances. In fact, on rare occasions, Moseley and Harrison were observed without their hardhats.

For instance, employee Bob Tillman received a warning letter in August 1992, for failure to wear a hardhat and in September 1993, he totaled a mixed truck which generated a second warning letter although the Respondent also felt that the roadway was defectively constructed. In December 1993, he received a further warning letter for failure to wear a hardhat. He was not suspended or terminated.

Employee Marvin Jones received a warning in May for carrying an acid jug in his 5-gallon water bucket. In December he was involved in an accident for which he received a verbal warning rather than a written warning due to his past record and quick reporting. Minor damage and joint responsibility of the contractor were noted in addition of safety incentive pay for December. He was not suspended or discharged.

Adrian Mendoza backed his mixer into a passenger car in September 1993, received a hardhat warning letter in December 1993, and had another chargeable accident in August. His second accident generated a verbal warning. He was not suspended or terminated.

Driver Ken Joos failed to set his safety brake and then left the vehicle unattended, thus allowing it to roll into the bulk truck. He was found chargeable at the August 31 safety meeting. No discipline was given although Harrison believed Joos lost his August incentive bonus. On September 30, Joos received a warning letter for hardhat, safety glasses, and vest violations.

Back-to-back chargeable accidents on August 1 and 8 resulted in one warning letter to driver Louie Leyba. Leyba was involved in a prior incident on May 3 which he did not report. However, under the circumstances, Harrison determined that Leyba may not have been aware of contact with the other vehicle in May.

In January employee James Lindsey received a warning letter for striking another vehicle while changing lanes to the right on I–25 ''causing a considerable amount of damage.'' On December 17, he received a verbal warning and loss of incentive bonus for December due to an accident on December 16.

After allowing his truck to slide into a wetland area in 1992 causing closing of the highway on three occasions and resulting in a warning letter noting $1200 in loss to the Respondent, driver Bob Richmier received a written warning for chargeable damage to the wheel of the loader on February 10.

Dispatch Supervisor Curtis Jones testified that during his 5-1/2 years in dispatch, he was aware of six incidents of damage to manholes. He was not aware of any discipline due to this damage because he would not have taken part in that. However, he was certain no discharges occurred because all of the drivers involved remained on the driver roster list for dispatch purposes.

Employee Paul Hastings was involved in three accidents in a 2- or 3-month period in the summer of 1992. According to Curtis Jones, he was taken off the employee roster shortly thereafter. The Respondent's records, however, do not include any disciplinary action taken against Hastings.

Had Teter's only transgressions been the accident and failure to wear a hardhat, Harrison stated that Teter would probably not have been discharged. However, Harrison testified that failure to report the accident was an act of dishonesty which, in conjunction with the chargeable accident and repeated hardhat violations, required discharge. Clearly, given this position, the pivotal issue of fact is whether the accident was reported. I find that it was for the following reasons.

I credit Teter and Harrison's original rendition of their discussion that when Harrison inspected the damage to the man-

[18] *Pinkerton's Inc*., 295 NLRB 538 (1989) (activities, statements, and knowledge of a supervisor are properly attributable to employer when the respondent does not establish a basis for negating the imputation of knowledge); cf. *Drug Plastics & Glass Co*., 309 NLRB 1306, 1310 (1992) (in order to impute supervisor's knowledge of union activity, supervisor must in fact be aware of activities).

[19] *Wright Line*, supra, 251 NLRB at 1089.

hole cover, no mention was made of failure to report the accident. I do not credit Harrison's testimony, which he added on cross-examination, that he asked Teter why he had not reported the accident. Although I find that Harrison was generally truthful,[20] I am convinced that he stretched on this point in order to defend the Respondent's position.[21]

Although the two dispatch personnel who testified, Curtis Jones and Edward Olivero, did not receive a call from Garcia or radio contact from Teter on August 31, neither of them was certain he worked taking calls that day. These witnesses were called by the General Counsel—not by the Respondent. The Respondent did not attempt to present evidence negating receipt of such a call other than Harrison's testimony that he personally was not aware of the accident until an unknown quality control inspector called to report it. Dispatch schedule coordinator Olivero, whom I credit, testified that accidents were ordinarily reported either by telephone contact with the contractor, or radio report from the driver, or sometimes by both.

Perhaps the failure to call the quality control personnel who purportedly informed the Respondent of the manhole damage on September 1 is the strongest factor upon which I rely in making my determination. I find that failure to call this individual warrants an adverse inference that the testimony would not have corroborated Harrison's on this point. Further, on this basis I discredit Harrison's testimony that the only way he learned of the incident was through quality control. Moreover, I note that the incident report completed by Harrison on September 1 states, ''This incident was not reported to dispatch or supervision by the driver but by a representative of Lawson Construction.'' Further, the letter of suspension which Harrison prepared states that, ''On August 31, 1994, we were advised by Lawson Construction that you were involved in an accident while on their jobsite.''

Accordingly, because I find that Teter's accident was reported to the Respondent,[22] the Respondent has failed to prove by a preponderance of the evidence that it would have discharged Teter in any event. Moreover, even if my credibility resolutions favored the Respondent and I had found that Harrison learned of the accident from quality control personnel on September 1, I would nevertheless find that Teter's discharge violated the Act.

Harrison testified that all accidents were reported immediately except for Teter's. However, I note that another employee apparently failed to report two accidents immediately pursuant to the Respondent's policy but nevertheless was not discharged. Employee Bob Underhill reported an accident which occurred during the day on April 14 at the end of his shift. Underhill was found at fault but received no warning letter of any kind—either for damage to the right rear catwalk of his vehicle or for failure to report the damage before the end of the shift.

One month later, on May 13, a contractor called to complain that Underhill had backed over a marker post and broken the watermeter standpipe. Underhill was found chargeable but did not receive a warning letter for failure to report this accident or for the damage caused. Harrison testified that Underhill was out of radio range and could not report the accident until the end of the shift but the customer called to complain of the accident early in the day. In addition, as mentioned above, driver Leyba failed to report an accident in May. However, Harrison investigated the matter and took his word that Leyba was unaware of contact with the car. In Teter's case, assuming I had credited Harrison's testimony on cross-examination that he asked Harrison why he had not reported the accident, Harrison did not take Teter's word that Garcia had called to report the accident. I find that Teter's union and protected, concerted activities were the basis for this difference.

The Respondent made a rather weak attempt to establish that Teter's ''attitude'' made him an unacceptable employee. Teter's attitude was not mentioned in his letter of discharge but Harrison testified that he was thinking about Teter's attitude when he wrote the discharge letter. The record, however, does not contain any evidence of disciplinary actions for poor attitude, abuse of customers, or disrespect of the Respondent. To the contrary, the record indicates that Teter had received raises (whether for merit or as part of a scheduled raise) and his mixer truck was recently replaced with a new truck. Moreover, Teter's purported attitude problem was ongoing and never addressed by the Respondent.

In summary, I find that counsel for the General Counsel has established a prima facie case pursuant to *Wright Line* and the Respondent has failed to show that even the absence of Teter's protected, concerted, and union activities, it would have discharged Teter. Accordingly, I find that the Respondent violated Section 8(a)(1) and (3) of the Act in suspending, discharging, and failing to reinstate Teter.

CONCLUSIONS OF LAW

1. By suspending and discharging Terry Teter and failing to reinstate him, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

2. By suspending and discharging Terry Teter and failing to reinstate him, the Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

[20] In fact, although it would have supported the Respondent's case, Harrison was unable to agree with Marvin Jones' rendition of Harrison's safety meeting admonitions regarding ''hiding'' accidents and progessive discipline for hardhat violations.

[21] Harrison stated on direct examination that he approached Teter, who was on the jobsite and ''we discussed the incident. . . . I went over to him. . . . I asked him what happened.'' Testimony about the substance of this conversation followed. Harrison was then asked, ''Was there anything said after that?'' Harrison stated that he did not recall anything further except that he told Teter he would investigate the accident further. ''I believe that was probably pretty much the extent. I don't recall the exact words.''

[22] Former dispatcher Olivero testified that accidents were reported by radio from the driver, by phone from the customer, or sometimes by both. In any event, the information was then relayed to Moseley or Harrison. I credit Olivero's testimony over Harrison's on this point. Harrison testified that each and every other accident was reported immediately by the driver involved. Harrison stated that he knew this was true because he would have remembered any divergence. However, Harrison was unable to recall any of the specifics about discipline invoked in these situations and the Respondent's own records indicate that not all accidents were reported by the driver involved, as in the Underhill and Leyba incidents.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent has violated Section 8(a)(1) and (3) by suspending, discharging, and failing to reinstate Terry Teter, the Respondent shall be ordered to offer Teter immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to expunge from its files any and all references to the unlawful suspension, discharge, and failure to reinstate, and to notify Teter in writing that this has been done.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

The Respondent, Ready Mixed Concrete Company, Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, discharging, failing to reinstate, or otherwise discriminating against any employee for supporting International Brotherhood of Teamsters, AFL–CIO, Local No. 13, or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Terry Teter immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful suspension, discharge, and failure to reinstate Teter and notify the employee in writing that this has been done and that the suspension, discharge, and failure to reinstate will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facilities in Denver, Colorado, copies of the attached notice marked ''Appendix.''[24] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Federal Labor law embodied in Section 7 of the National Labor Relations Act gives employees and employee applicants the following rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choosing
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT suspend, discharge, and fail to reinstate Terry Teter or any of our employees because they engaged in activities on behalf of International Brotherhood of Teamsters, AFL–CIO, Local No. 13 or protected, concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer employee Terry Teter full and immediate reinstatement to his former position, without loss of seniority or other benefits and WE WILL make Terry Teter whole, with interest, for any loss of pay or benefits suffered by reason of our discrimination against him.

WE WILL expunge from Terry Teter's personnel files any reference to his suspension, discharge, and our failure to reinstate him and WE WILL notify him in writing that we have removed these materials from our files and that our suspension, discharge, and failure to reinstate him will not be used against him in any way.

READY MIXED CONCRETE COMPANY